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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 123

DIRK DEJONGE,
Appellant,
v.
THE STATE OF OREGON,
Appellee.

Appeal from the Supreme Court of the State of Oregon.

APPELLEE'S BRIEF

JAMES R. BAIN,
District Attorney,
Multnomah County,
Portland, Oregon,
MAURICE E. TARSHIS,
Portland, Oregon,
Deputy District Attorney,
Counsel for Appellee.
WILLIS S. MOORE,
Salem, Oregon,
Assistant Attorney General,
for State of Oregon,
Of Counsel for Appellee.

OSMOND K. FRAENKEL,
New York, N. Y.,
Counsel for Appellant,
GUS J. SOLOMAN,
Portland, Oregon,
LEO LEVENSON,
Portland, Oregon,
IRVIN GOODMAN,
Portland, Oregon,
Of Counsel for Appellant.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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STATEMENT

Appellant was convicted for violation of the Oregon Criminal Syndicalism Act. From such conviction he appealed to the Supreme Court of the State of Oregon, which court affirmed the judgment of the lower court, and subsequent thereto denied a petition for rehearing in the same. The opinion of the Supreme Court of Oregon is found in 152 Ore. 315, 51 Pac. (2nd) 674, and is copied in the transcript of record in this case, beginning at page 20.

The appellant has appealed to this Court, contending as follows:

1. That the law is unconstitutional because, as construed by the Supreme Court of the state, it punishes participation in a lawful meeting merely because the meeting was called by a group which the jury found elsewhere advocated the prescribed doctrines.

2. That appellant was entitled to a directed verdict.

POINT I

The Oregon Criminal Syndicalism Act as applied to this case is definite and certain, and it follows, then, that it is constitutional.

Whitney v. California, 274 U.S. 357, 368.
Connally v. General Construction Co., 269 U.S. 385, 391.
Miller v. Strahl, 239 U.S. 426, 434.
Nash v. United States, 229 U.S. 373, 377.
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 108.
State v. Hennessy, 114 Wash. 351, 195 Pac. 211.
State v. Laundy, 103 Ore. 443, 463, 204 Pac. 958.
People v. Ruthenberg, 229 Mich. 315, 201 N.W. 358.
People v. Steelik, 187 Cal. 361, 373, 205 Pac. 78.
People v. Lloyd, 304 Ill. 23, 35, 136 N.E. 505.
State v. Dingman, 37 Id. 253, 265, 219 Pac. 760.
Berg v. State, 29 Ok. Cr. Rep. 112, 121, 233 Pac. 497.
State v. Worker's Socialist Pub. Co., et al, 150 Minn. 406, 407, 185 N.W. 931.

ARGUMENT

The Oregon Criminal Syndicalism Law, Sections 14-3110, 14-3111 and 14-3112, Oregon Code, 1930, as amended by Chapter 459, Oregon Laws, 1933, reads thus

"Section 14-3110. Criminal syndicalism hereby is defined to be the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.

"Section 14-3111. Sabotage hereby is defined to be intentional and unlawful damage, injury or destruction of real or personal property.

"Section 14-3112. Any person who, by word of mouth or writing, advocates or teaches the doctrine of criminal syndicalism, or sabotage, or who prints, publishes, edits, issues or knowingly circulates,

sells, distributes or publicly displays any books, pamphlets, paper, handbill, poster, document or written or printed matter in any form whatsoever, containing matter advocating criminal syndicalism, or sabotage, or who shall organize or help to organize, or solicit or accept any person to become a member of any society or assemblage of persons which teaches or advocates the doctrine or criminal syndicalism, or sabotage, or any person who shall orally or by writing or by printed matter call together or who shall distribute or circulate written or printed matter calling together or who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization, or any society, or any group which teaches or advocates the doctrine of criminal syndicalism or sabotage is guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the state penitentiary for a term of not less than one year nor more than ten years, or by a fine of not more than $1,000, or by both such imprisonment and fine."

As was said by this Court, speaking through Mr. Justice Sutherland, in the case of *Connally v. General Construction Co.*, 269 U.S. 385, 391:

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statute involved were upheld; in others declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them." * * *

or,

"a well settled common law meaning, notwithstanding an element of degree in the definition as to

which estimates might differ." * * * or as broadly stated by Mr. Chief Justice White, in the case of *United States v. Cohn Grocery Company*, 255 U.S. 81, 92 "* * * that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded."

In the case of *Whitney v. California*, 274 U.S. 357, the Court had under consideration the Constitutionality of the California Criminal Syndicalism Act, the appellant therein contending that the Act was repugnant to the due process clause by reason of vagueness and uncertainty of definition. This court, speaking through Mr. Justice Sanford, said on page 368:

"It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221; and *United States v. Cohn Grocery*, 255 U.S. 81, 89, because not fixing an ascertainable standard of guilt. The language of Sec. 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear; the definition of 'Criminal syndicalism' specific.

"The Act plainly, meets the essential requirement af due process that a penal statute be 'sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' *Connally v. General Construction Co.*, 269 U.S. 385, 391. And see *United States v. Brewer*, 139 U.S. 278, 288; *Chicago, etc., Railway v. Dey*, (C. C.), 35 Fed. 866, 876; *Tozier v. United States* (C. C.) 52 Fed. 917, 919. In *Omaechevarria v. Idaho*,

246 US. 343, 348, in which it was held that a criminal statute prohibiting the grazing of sheep on any 'range' previously occupied by cattle 'in the usual and customary use' thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a 'range' or to determine the length of time necessary to constitute a prior occupation a 'usual' one this Court said: 'Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty in application to necessarily varying facts than has been repeatedly sanctioned by this court. *Nash v. United States*, 229 U.S. 373, 377; *Miller v. Strahl*, 239 U.S. 426, 434." So, as applied here, the Syndicalism Act required of the defendent no 'prophetic' understanding of its meaning.

"And similar Criminal Syndicalism statutes of other states, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. *State v. Hennessy*, 114 Wash. 351, 364; *State v. Laundy*, 103 Ore. 443, 460; *People v. Ruthenberg*, 229 Mich. 315, 325. And see *Fox v. Washington*, 236 U.S. 273, 277; *People v. Steelik*, 187 Cal. 361, 372; *People v. Lloyd*, 304 Ill. 23, 24."

In the case of *Waters-Pierce Oil Co. v Texas* (No. 1), 212 U.S. 86, 108, this court had under consideration certain anti trust laws of Texas, it being contended that because of the vagueness and the indefiniteness of certain prohibitive acts that the said acts were not constitutional as they deprived one of due process of law, the objection being that the Texas statute denounced contracts and arrangements reasonably calculated to fix and regulate the price of commodities, etc. It was insisted that this law was so indefinite that no one could tell what acts were embraced within its pro-

visions. It was held therein that this was a sufficiently definite statute to denounce restraint of trade.

In the case of *Miller v. Strahl*, 239 U.S. 426, this court had under consideration that part of a Nebraska statute which provided, among other things:

> "* * * It shall be the duty of each proprietor, or keeper of such hotel or lodging house in case of fire therein to give notice of same to all guests and inmates thereof at once and *to do all in their power* to save such guests and inmates."

This statute was attacked on the ground that it contravenes the Constitution of the United States, because it fails to prescribe any fixed rule of conduct. The argument was that the requirement to do all in one's power fails to inform a man of ordinary intelligence what he must or must not do under given circumstances. This court said on page 434:

> "Rules of conduct must necessarily be expressed in general terms and dependent upon their application upon circumstances, and circumstances vary. It may be true, as counsel says, that 'men are differently constituted, some being abject cowards, and few only are heroes,' and that the brains of some people work 'rapidly and normally in the face of danger, while other people lose all control over their actions.' It is manifest that rules could not be prescribed to meet these varying qualities. And all must be brought to judgment, and what better test could be devised than the doing 'all in one's power' as determined by the circumstances? The case therefore falls under the rule of *Nash v. United States*, 229 U.S. 373, and not under the rule of *International Harvester Co. v. Missouri*, 243 U.S. 199."

In the case of *Nash v. United States*, 229 U.S. 373, objection was made to the act commonly known as the Sherman Act, which denounces conspiracy in restraint

of trade and conspiracy to monopolize trade, on the ground that the statute contains in its definition an element of degree as to which estimates may differ with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men, and this court, speaking through Mr. Justice Holmes, said in part as follows (p. 377):

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' *Commonwealth v. Pierce*, 138 Mass. 165, 178. *Commonwealth v. Chance*, 174 Mass. 245, 252. 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' I East P.C. 262. If a man should kill another by driving an automobile furiously into a crowd he might be convicted of murder however little he expected the result. See *Reg. v. Desmond*, and other illustrations in Stephens, Dig. Crim. Law, art. 223, 1st ed., p. 146. If he did no more than drive negligently through a street he might get off with manslaughter or less. *Reg. v. Swindall*, 2 C. & K. 230; *Reg. v. Burton*, 1 Strange, 481. And in the last case he might be held although he himself thought that he was acting as a prudent man should. See The Germanic, 196 U.S. 589, 596. But without further argument, the case is very

nearly disposed of by *Waters-Pierce Oil Co. v. Texas* No. 1), 212 U.S. 86, 109, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of the opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Statutes similar in nature to the Oregon Criminal Syndicalism Act, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness.

In the case of *State v. Hennessy*, 114 Wash., 351, the Court held the following statute not void for indefiniteness:

"Section 1. Whoever shall

"(1) Advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(2) Print, publish, edit, issue or knowingly sell, circulate, distribute or display any book, pamphlet, paper, handbill, document, or written or printed matter of any form, advocating, advising, teaching or justifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or

"(3) Organize or help to organize, give aid to, be a member of or voluntarily assemble with any group of persons formed to advocate, advise or teach crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change.

"Shall be guilty of a felony."

In *State v. Laundy*, 103 Ore. 443, the Court had under consideration that part of an Oregon statute which provided, among other things:

"Any person who * * * helps to organize or become a member of, or voluntarily assembles with any society or assemblage of persons which teaches, advocates or affirmatively suggests the doctrine of criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime of unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony."

This statute was attacked upon the ground that it was too vague, indefinite and uncertain. This court said, on page 463:

"The defendant insists that the statute is void because it is too vague, indefinite and uncertain, and that the indictment is likewise bad because of indefiniteness. The state Constitution, Article I, Section 11, prescribes that the accused shall have the right 'to demand the nature and cause of the accusation against him.' The Code, Section 1437, Or. L., commands that the indictment shall contain:

"'a statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.'

"Another section of the Code, Section 1440, Or. L., declares that the indictment must be direct and certain as it regards—'the crime charged; and, the particular circumstances of the crime charged when they are necessary to constitute a complete crime.'

"The Code, Section 1448, Or. L., further provides that the indictment is sufficient if it can be understood therefrom—

"'that the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of commoun understanding to know what is intended.'

"The crime of which the defendant is accused is a statutory offense. The statute declares that any person who 'helps to organize or become (s) a member of, or voluntarily assembles with any society or assemblage of persons" which teaches the prohibited doctrines shall be guilty of criminal syndicalism. The statute specifies the acts of commission which will effect the crime. The statute informs every person subject to the jurisdiction of the courts of this state that he commits the crime of criminal syndicalism if he (1) helps to organize; or (2) if he becomes a member of; or (3) if he voluntarily assembles with any society or assemblage of persons which teaches the inhibited doctrines. The statute describes the acts which constitute the crime. The indictment describes the acts with which the defendant is charged in the same language which is employed in the statute to define the prohibited acts. The indictment contains every element of the complete offense as that offense is defined by the statute. The state is not required to plead the evidence relied upon to prove the acts alleged to have been committed by the defendant. The indictment advises the defendant not only of the nature but also of the cause of the accusation made against him. The language employed is such as to enable a person of common understanding to know what is intended. *The statute defines the kind of societies and assemblages which no person can organize or help to organize or become a member of or assemble with.* (Italics ours.) The indictment describes the Industrial Workers of the World in the same language which the statute uses to describe unlawful societies. Words of description used in the indictment are just as definite and certain as are the words of description used in the statute; and assuredly the words of the statute are sufficiently definite to describe the acts intended to be prohibited and the kind of societies and assemblages intended to be banned: *People v. Malley* (Cal. App.), 194 Pac. 50; *State v. Quinlan*, 86 N.J. L. 120, 123 (91 Atl. 111); *State v. Rose*, 147 La. 243 (84 South. 643, 646); *State v. Hen-*

nessy, 114 Wash. 351 (195 Pac. 211, 215); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 86 (53 L. Ed. 417, 29 Sup. Ct. Rep. 220)."

In *People v. Ruthenberg,* 229 Mich. 315, the Court at page 325, said:

"It is claimed the provisions of the statute do not fix an ascertainable standard of guilt and are not adequate to inform persons, accused of violation thereof, of the nature and cause of accusation against them. It is said in support of this that the term 'sabotage' is subject to a variety of innocent meanings, and the term 'violence' is not necessarily limited to physical or criminal violence. The naivette of this should make a communist smile. One need read but little to discover what the terms sabotage and violence mean with reference to industrial or political agenda advocated by radicals. The term sabotage is so well understood by communists as to be employed in the theses and resolutions adopted at the third world congress of the Communist International without any explanation to exclude possible innocent meaning. Dictionaries have explained the meaning of sabotage for many years. Sabotage has had a well understood meaning ever since French industrial workers threw their sabots, or wooden shoes, into machinery. It signifies a willful act of destruction, and has so been understood by writers for many years. Non-criminal sabotage, such as loafing on the job, of course, does not fall within the act. The legislature evidently intended to denounce the 'revolutionary notion' of sabotage, as mentioned by Austin Lewis in the 'Militant proletaria.' (1911.)

"Sabotage appears as a disagreeable incident in a revolutionary campaign, unjustifiable under conditions which exclude the revolutionary notion, but perfectly justifiable in terms of the revolutoin."

"In law, the term 'violence' means the unlawful exercise of physical force, or intimidation by its exhibition and threat of employment. The meaning of

the term is not uncertain. See *People v. Lloyd, supra.* The statute and information are not void for uncertainty. *People v. Steelik, supra.*"

In *People v. Steelik,* 187 Cal. 361, 373, the Court declared the California Criminal Syndicalism Act definite and certain.

In *People v. Lloyd,* 304 Ill. 23, the Court, in construing the Criminal Syndicalism Act of Illinois, said on page 35:

"Plaintiffs in error further contend that because of uncertainties and ambiguities appearing in the statute, they are deprived of the right to be informed of the nature and cause of the accusations against them, and that the act is therefore repugnant to Section 9 of Article 2 of the State Constitution, and that they are deprived of their liberty and property without due process of law, thereby making the act repugnant to Section 2 of Article 2 of the State Constitution and the Fourteenth Amendment to the Constitution of the United States. We have already said that there are no substantial uncertainties or ambiguities in the language of the act and that the words used in it, taken in their ordinary sense, clearly express the legislative intent. There is no organic rule of law or rule of sound public policy that requires the legislature to define the meanings of English words in common and daily use. (*State v. Quinlan,* 86 N.J. L. 120, 91 Atl. 111). Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requisition is satisfied. Due process of law is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. (*Caldwell v. State,* 137 U.S. 692, 11 Sup. Ct. 224; *Burdick v. People,* 149 Ill. 600.) These objections to the validity of the statute are without merit. See *State v. Moilen* (Minn.) 167 N.W. 345, 1 A.L.R. 331, and note."

In *State v. Dingman*, 37 Ida. 253, the Court, in construing the Criminal Syndicalism Act of Idaho, said on page 265:

"The legislature in creating an offense may define it by a particular description of the act or acts constituting it, or it may define it as any act which produces, or is unreasonably calculated to produce, a certain defined or described result, or it may group together various means by which the end may be accomplished and make any one of such means an offense when done to attain the object denounced by the statute. In the absence of a provision to the contrary, a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied. In creating an offense which was not a crime at common law, a statute must of course be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty. Reasonable certainty, in view of the conditions, is all that is required, and a liberal effect is always to be given to the legislative intent when possible * * * A penal statute is sufficiently certain, although it may use general terms, if the offense is so defined as to convey to a person of ordinary understanding an adequate description of the evil intended to be prohibited. (16 C.J. 67, sec. 28; *Stewart v. State*, 4 Okl. Cr. 564, 109 Pac. 243, 32 L.R.A., N.S. 505; *State v. Lawrence*, 9 Okl. Cr. 16, 130 Pac. 508; *State v. Fox*, 71 Wash. 185, 127 Pac. 1111; *State v. Lowery*, 104 Wash. 520, 177 Pac. 355; *State v. Hennessy*, 114 Wash., 351, 195 Pac. 211; *People v. Malley*, 49 Cal. App. 497, 194 Pac. 48; *People v. Steelik*, 187 Cal. 361, 203 Pac. 78; *People v. Lesse*, 52 Cal. App. 280, 199 Pac. 46; *State v. Laundy*, 103 Or. 443, 204 Pac. 958, 206 Pac. 290.)

"We think the statute and the information based thereon are not vulnerable to the attack that the language is so indefinite and uncertain that an individual may not know with reasonable certainty whether his act is in violation of the same."

In *Berg v. State*, 29 Okl. Cr. Rep. 112, the Court, in construing the Criminal Syndicalism Act of Oklahoma, said on page 121:

> "It is also contended that the law in question is unconstitutional for the reason that it does not clearly and explicitly set out the acts which constitute the offense. This objection to the constitutionality of the act has been generally raised in the cases heretofore mentioned and the objection held not to be sound. The words used in the definition of the offenses, which are not defined in the act itself, have well-recognized meanings and the language used fairly defines the crime created by the statute. *People v. Steelik, supra; People v. Malley, supra; State v. Workers Soc. Pub. Co.*, 150 Minn. 406, 185 N.W. 931; *State v. Hennessy, supra.*"

In *State v. Worker's Socialist Pub. Co., et al*, 150 Minn. 406, the Court, in construing the Criminal Syndicalism Act of Minnesota, said on page 407:

> "Defendants contend that the statute is so uncertain and indefinite that it is in violation of the provisions of our Constitution that, in any criminal prosecution, the accused shall be entitled to know the nature and cause of the accusation against him. Const. Minn. Art. 1, Sec. 6. The statute was before the court in *State v. Moilen*, 140 Minn. 112, 167 N.W. 345, 1 A.L.R. 331. Its constitutionality was there sustained as against attack made on other grounds. We think it must also be sustained as against the contentions of the defendants. It forbids any one to teach the duty, necessity or propriety of crime, sabotage and other unlawful methods of terrorism as a means of accomplishing industrial or political ends. These words need no further definition. The language used seems to us to fairly and plainly define the crime which the statute creates."

In the case of *Stromberg v. California,* 283 U.S. 359, and which is the case upon which appellant strongly relies in his argument that the Oregon Criminal Syndicalism Act is void since it makes possible the condemnation of a wholly lawful act, this court had under consideration that part of the California Criminal Syndicalism Act, which provided, among other things:

> "Any person who displays a red flag, banner or badge or any flag, badge, banner, or device of any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony."

This Court, in construing the first clause of this statute, stated as follows:

> "The question is thus narrowed to that of the validity of the first clause, that is, with respect to the display of the flag 'as a sign, symbol or emblem of opposition to organized government,' and the construction which the state court has placed upon this clause removes every element of doubt. The state court recognized the indefiniteness and ambiguity of the clause. The court considered that it might be construed as embracing conduct which the state could not constitutionally prohibit. Thus it was said that the clause 'might be construed to include the peaceful and orderly opposition to a government as organized and controlled by one political party by those of another political party equally high-minded and patriotic, which did not agree with the one in power. It might also be construed to include peaceful and orderly opposition to government by legal means and within constitutional limitations.' The maintenance of the opportunity for

> free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the 14th Amendment. The first clause of the statute being invalid upon its face, the conviction of the appellant, which so far as the record discloses may have rested upon that clause exclusively, must be set aside."

The Stromberg case is to be differentiated from the case at hand, in that in that case the first clause of the statute was construed by the court as being so vague and indefinite that it might be considered as embracing conduct which the state could not constitutionally prohibit, while in the case at hand the statute fixes an ascertainable standard of guilt and it cannot be reasonably construed, as contended by appellant, to embrace conduct which the state could not constitutionally prohibit. In the case at hand, the crime of which the appellant is accused, is a statutory offense. The Oregon Criminal Syndicalism Act declares, among other things, that any person who presides at, conducts or assists in conducting any assemblage of persons, or any organization which teaches the prohibited doctrines shall be guilty of criminal syndicalism. The statute clearly specifies the acts of commission which will effect the crime. The statute defines the kind of assemblages and organizations which no person can preside at, conduct or assist in conducting. The statute is sufficiently explicit to inform every person subject to the jurisdiction of the courts of Oregon that he commits the crime of criminal syndicalism, and not

otherwise, if he presides at, conducts or assists in conducting a meeting of an organization or group which teaches or advocates criminal syndicalism or sabotage.

Under this construction the statute does not prohibit peaceful and orderly opposition to government by peaceful means and within constitutional limitations, but only prohibits such conduct as may tend to incite to crime, disturb the public peace, or endanger the foundation of organized government and threaten its overthrow by unlawful means. That the state may, in the exercise of its police powers, prohibit such conduct, is not open to question, as can be readily seen from the reasoning in Point II of this brief.

POINT II

The Oregon Criminal Syndicalism Act as applied to this case does not violate the constitutional right of freedom of speech nor the constitutional right of freedom of assembly.

Herndon v. Georgia, 295 U.S. 441.
Stromberg v. California, 283 U.S. 359, 368.
Whitney v. California, 274 U.S. 357, 371.
Gitlow v. New York, 268 U.S. 652, 669.
People v. Ruthenberg, 229 Mich. 315 (201 N.W. 358).
State v. Boloff, 138 Ore. 568, 623 (4 Pac. (2nd) 775).
State v. Laundy, 103 Ore. 443, 462 (204 Pac. 958).

ARGUMENT

That the right of free speech and assembly is not an absolute one and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending

to incite to crime, disturb the public peace, or endanger the foundation of organized government and threaten its overthrow by unalwful means is not open to question. *Stromberg v. California*, 283 U.S. 359, 368; *Whitney v. California*, 274 U.S. 357, 371; *Gitlow v. New York*, 268 U.S. 652, 666-668.

The appellant contends that the statute as construed and applied in this case is unreasonable and arbitrary and therefore infringes upon his right of freedom of speech and assembly. This contention is without merit.

In the case of *Gitlow v. New York*, *supra*, the Court had under consideration a New York statute punishing those who advocate, advise or teach the duty, necessity or propriety of overthrowing organized government by force, violence, or any unlawful means, or who print, publish, or knowingly circulate any book, paper, etc., advocating, advising or teaching the doctrine that organized government should be so overthrown. The defendant was charged with violating said Act. The evidence showed that the defendant was a member of the Left Wing Sector of the Socialist Party, a national organization; that such society at a conference of its delegates adopted a "Manifesto," which advocated and urged in fervent language mass action which shall progressively foment industrial disturbances and through political mass strikes and revolutionary mass action overthrow and destroy organized parliamentary government; and that the defendant advocated the adoption of such program and was responsible for the publication and circulation of such Manifesto. There was no evidence of any affect resulting from publication and circulation of the same.

The defendant was convicted, and appealed to this Court, contending, among other things, that the statute, as construed and applied in this case by the State courts, deprived him of his liberty of expression in

violation of the due process clause of the Fourteenth Amendment, in that while the liberty of expression is not absolute, it may be restrained only in circumstances where its exercise bears a casual relation with some substantive evil, consumated, attempted or likely.

The court, in holding the Act as applied to this case constitutional, said on page 669:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. Such utterances, by their very nature, involve danger to the public peace and to the security of the state. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. The state cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment suppress the threatened danger in its incipiency. . . . In other words, when the legislative body has determined generally in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming

within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition. . . . And the general statement in the Schenck case (p. 52) that the 'question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils,'—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

The ruling in the Gitlow case was later reaffirmed in the case of *Whitney v. United States, supra.* In that case the court had under consideration that part of the California Criminal Syndicalism Act which provided among other things:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property) or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.

"Section 2. Any person who: * * * 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism * * *

"Is guilty of a felony and punishable by imprisonment."

The defendant was charged with violating said act. The evidence showed that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this society was organized to advocate, teach, aid or abet criminal syndicalism as defined by the act. The defendant was convicted and upon affirmance of conviction in the lower court, appealed to this court contending, among other things, that the California Syndic lism Act as applied in this case was repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association. This court, through Mr. Justice Sanford, said on page 371:

"Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

"That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridles license giving immunity for every possible use of langauge and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse theis freedom by utterances inimical to the public welfare, tending to incite to crime; disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow v. New York*, 268 U.S. 652, 666-668, and cases cited.

"By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such dangers to the public peace

and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler v. Kansas*, 123 U.S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern Railway v. Clara City*, 246 U.S. 434, 439.

"The essence of the offense denounced by the Act is the combining with others in an association for the accomplishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People v. Steelik*, *supra*, 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and act of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State * * *"

It is to be observed that the contention of the appellant in the case at hand is similar to that made in the Whitney case. It is further to be observed that the question in both these cases is substantially the same —in the Whitney case the question before the court being whether an act which makes it a crime to be a member of or to assist in organizing an organization which taught and advocated criminal syndicalism and sabotage is repugnant to the due process clause of the Fourteenth Amendment as a restraint of the rights of free speech and assembly, while in the case at hand the question before the court is whether an act which

makes it a crime to conduct or to assist in conducting a meeting of an organization which teaches and advocates criminal syndicalism and sabotage is repugnant to the due process clause as a restraint of the rights of free speech and assembly.

And in the case of *Herndon v. Georgia*, 295 U.S. 441, this court had under consideration a Georgia statute which makes it a crime to incite insurrection. The statute provided as follows:

> "Section 55. Penal Code of Georgia: 'Insurrection shall consist in any combine resistance to the lawful authority of the state, with intent to the denial thereof, when the same is manifested, or intended to be manifested, by acts of violence.'
>
> "Section 56. Penal Code of Georgia: 'Any attempt by persuasion or otherwise, to induce others to join in any combined resistance to the lawful authority of the state shall constitute an attempt to incite insurrection.'"

In passing upon whether this act contravenes the Fourteenth Amendment, this court, speaking through Mr. Justice Sutherland, quotes with approval the language of the Supreme Court of Georgia in *Carr v. State*, 176 Ga. 747 (169 S.E. 201), in which the Georgia court construed Section 56 of the Penal Code of Georgia, above quoted as follows:

> "'It (the state) can not reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may in the exercise of its judgment, suppress the threatened danger in its incipiency * * * Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there

is a present and immenent danger of the success of the plant advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law.'

"The language contained in the subquotation is taken from *People v. Lloyd*, 304 Ill. 23, 35; 136 N.E. 505, and is quoted with approval by this court in *Gitlow v. New York*, 268 U.S. 652, 669."

Statutes similar in nature to the Oregon Criminal Syndicalism Act have been held by the state courts not to violate the constitutional right of freedom of speech and assembly. Although there are innumerable decisions to be cited wherein state courts have so held, for the purposes of this brief only three such decisions will be discussed herein. They are *People v. Ruthenberg*, 229 Mich. 315, 201 N.W. 358; *State v. Boloff*, 138 Ore. 568, 4 Pac. (2nd) 775, and *State v. Laundy*, 103 Ore. 443, 204 Pac. 950, which cases, through clear reasoning and ample citation of authority, hold that their Criminal Syndicalism Acts do not infringe upon the freedom of speech and assembly.

In the case of *People v. Ruthenberg, supra*, the defendant was indicted for violation of the State Criminal Syndicalism Act by voluntarily assembling with the Communist Party of America, which party was formed to advocate the doctrines of Criminal Syndicalism. The evidence seemed to indicate that the defendant, as a member of the Central Executive Committee of the Communist Party of America, an organization formed to advocate and teach the doctrines of Criminal Syndicalism, by virtue of his office attended the convention of that organization as a delegate. Defendant was convicted, and upon appeal contended, among other things, that the statute under which he

was convicted was unconstitutional in that it deprived him of the right of freedom of speech and assembly. In passing upon this point, the Court said in part, as follows:

> "Does this statute contravene the right of the people to peaceably assemble? To so hold would require us to say that it is violative of the Constitution to make it a crime for one in sympathy with and on his own volition to join in an assemblage of persons formed to teach or advocate crime, sabotage, violence, or other unlawful methods of terrorism, as a means of accomplishing industrial or political reform. We cannot make any such holding.
>
> "Does the statute prevent freedom of speech? This statute reaches an abuse of the right to freely speak, write, and publish sentiments, and is squarely within the accountability allowed to be exacted in the very provision invoked. This statute does not restrain or abridge liberty of speech."

In the case of *State v. Boloff, supra,* the Court had under consideration that part of the Oregon Criminal Syndicalism Act, which provides, among other things:

> "Any person * * * who shall be or become a member of, or organize or help to organize, or solicit or accept any person to become a member of, or voluntarily assemble with any society or assemblage of persons which teaches, advocates, or affirmatively suggests the doctrine or criminal syndicalism, sabotage, or the necessity, propriety or expediency of doing any act of physical violence or the commission of any crime or unlawful act as a means of accomplishing or effecting any industrial or political ends, change or revolution or for profit, is guilty of a felony. * * *"

The defendant was charged with violating said Act by, among other things, being a member of the Communist Party, an organization which taught and advo-

cated Criminal Syndicalism and Sabotage. The evidence showed that the defendant was a member of the Communist Party and that the Communist Party taught and advocated such prohibited doctrines. Defendant was convicted and upon appeal contended that the statute under which he was convicted was unconstitutional, in that it deprived him of the right of freedom of speech and assembly. In passing upon this point the Court said, in part, on page 623, as follows:

> "The problem now arises whether legislation of this kind based upon the above principles is violative of the sections of the Federal and Oregon Constitutions which grant the right of freedom of speech and of peaceable assembly. The clear reasoning and ample citation of authority in Mr. Justice Harris' decision in *State v. Laundy, supra*, ought to convince any inquiring mind that no conflict exists between this act and those constitutional provisions. The decision just mentioned states: 'The Syndicalism Act does not violate the constitutional right to speak freely nor the constitutional right to assemble peaceably.' In addition to the numerous authorities cited by Mr. Justice Harris supporting the validity of such statutes will be found collected in the following compendiums many additional decisions to like effect: 20 A.L.R. 1535, I A.L.R. 336, 19 Cal. Law Rev. 64, and 76 Penn. Law Rev. 198. And see also the cases cited in *Berg v. State*, 29 Okl. Cr. 112 (233 p. 497.). * * *"

It may not be amiss to point out that in this case the Court held ineffective somewhat the identical argument that has been submitted by counsel in the case at hand, stating on page 604:

> "* * * In *Whitney v. California*, 274 U.S. 357, the identical argument that counsel submits to us was carefully considered and held ineffective, as was also done in *Commonwealth v. Widovich*, 295 Pa. 311 (145 Atl. 295). The defendant rests his ar-

gument entirely upon the remarks of Mr. Justice Brandeis in his specially-concurring decision in *Whitney v. California, supra,* wherein he held that the right of free speech and of assembly can be restricted only when the limitation is necessary to protect the State from imminent destruction or from serious injury. He, however, found that the conduct of Miss Whitney and her associates threatened danger to the state in such an imminent and serious manner that the application of the Act to her case did not violate any safeguards guaranteed to her by the Fourteenth Amendment. He also pointed out that if the defendant believed that the application of the Act to her conduct violated any provisions of the Fourteenth Amendment, due to the absence of imminent threats of danger to the State, she could have requested special findings from the jury. In *Schenck v. United States,* 249 U.S. 47 (30 S. Ct. 247, 63 L. Ed. 470), the court pointed out:

"'The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.'"

In the case of *State v. Laundy, supra,* referred to in the case of *State v. Boloff, supra,* the defendant was charged with the violation of the Oregon Criminal Syndicalism Act by helping to organize, becoming a member of and voluntarily assembling with the Industrial Workers of the World, which organization taught and advocated the doctrine of criminal syndicalism and sabotage.

The evidence in the case seemed to indicate that the defendant was a member of the Industrial Workers of the World and that that organization taught and advocate the doctrine of criminal syndicalism and sabotage.

The evidence further seemed to indicate that the defendant voluntarily assembled with such organization.

There was no evidence of any advocation of criminal syndicalism or sabotage at such meeting. The defendant was convicted and upon appeal contended that the criminal syndicalism statute was unconstitutional for the reason that it infringes upon the right of free speech and encroaches upon the right of assemblage. In passing upon this point the court held that the syndicalism act did not violate the constitutional right to speak freely nor the constitutional right to assenble.

By enacting the present statute, the State has determined through its legislative body, that to preside at, conduct, or assist in conducting a meeting of an organization which has as its objective the advocacy, teaching or affirmative suggestion of crime, sabotage or violence as a means of affecting a change or revolution in industry or government, involves such dangers to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in the validity of this statute. *Whitney v. California, supra; Mugler v. Kansas*, 123 U.S. 623, 661. The Courts will not pronounce an act of the legislature unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Whitney v. California, supra; Great Northern Railway v. Clara City*, 246 U.S. 434, 439. If the Act does not invade the constitutional rights of the citizen, then the statute must be sustained and effect must be yielded to it by the courts, even though the latter may seriously disagree with the wisdom of such enactment. *Fox v. Washington*, 236 U.S. 273, 278; *State v. Boloff*, 138 Ore. 568, 611.

The evidence in this case showed that the Communist Party teaches and advocates criminal syndicalism

and sabotage as a means of affecting a change or revolution in industry or government. That such teaching and advocation present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion is not open to question. *Gitlow v. New York, supra; Whitney v. California, supra, and Herndon v. Georgia, supra.* Such teaching and advocation, by their very nature, involve danger to public peace and to the security of the state, for they threaten breaches of the peace and ultimate revolution.

Legislation of the type before us was enacted, not for the purpose of denying to anyone the right of teaching socialism, communism, or any other form of social or economic compact, but for the exclusive purpose of preventing the advocation or use of violence by, among other things, forbidding anyone to preside at, conduct or assist in conducting a meeting of an organization which teaches it. Laws of this type are founded upon the principle that the moron, especially those who are class conscious, and who believe that men in high places got there through imposition upon the toilers, are likely to translate into action the words of their voluble leaders. The will of the schemer is often carried out by the acts of the unthinking. *State v. Boloff, supra,* 622.

In passing this Act the Oregon legislature evidently deemed it necessary to put a stop to activities which would naturally result in crimes against persons and property. Such a law directly or indirectly accomplishes the object of preventing the advocacy, teaching or affirmative suggestion of criminal syndicalism and sabotage and the object of curtailing the activities of an organization which has such a program as it objective. By making it a crime to preside at, conduct, or assist in conducting a meeting of the Communist Party, meetings of such an organization are prevented.

By preventing such meetings, the opportunity of such organization to further its activities and the advocation of criminal syndicalism and sabotage is greatly lessened, for it prevents such a society, among other things, from having the opportunity before a large group of disseminating its propaganda, or selling its literature or soliciting membership in its organization. That the main purpose of the Communist Party in holding its meeting is to disseminate its propaganda, to sell its literature and to solicit membership in its organization can be clearly seen from the facts in this case.

Activities of the Young Communist League were discussed at some length at the meeting (8). Relation of various police raids to the longshoremen's strike and the Communist movement were discussed there (8). Everyone at the meeting was urged to be present at the street meeting of the Communist Party to be held at Fourth and Alder Streets the following evening to show their defiance to local police authorities and to assist the Communist Party in their revolutionary tactics (9). Communist literature was sold at the meeting and the people present there were urged to purchase the same (9). New members in the Communist Party were solicited there and everybody at the meeting was urged to do more work in getting more members for that party (9).

From the above reasoning it cannot be said that the state is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, makes it a crime for anyone to preside at, conduct or assist in conducting a meeting of an organization which has as its objective the advocacy, teaching or affirmative suggestion of criminal syndicalism and sabotage.

Even assuming that the ruling in *Schenck v. United States*, 249 U.S. 47, that the right of freedom of speech

and assembly can be restricted only when the limitation is necessary to protect the State from imminent destruction or from serious injury applies to the facts in the case at bar, then it is contended that the appellant, by his failure to raise such question at any time prior to this appeal, is now precluded from so contending. *Whitney v. California, supra,* page 379. Furthermore, there was evidence in the case at bar from which the court or jury might have found that there was a clear and present danger of serious evil to the State of Oregon by the conduct of the appellant and the Communist Party, whose meeting he assisted in conducting and of which organization he was a member. The appellant urged everyone present at the meeting to do more work in getting more members for the Communist Party (9), solicitation of members in such organization being a crime under Section 14-3112, Oregon Code, 1930, as amended by Chapter 459, General Laws of Oregon for 1933. He also urged those at the meeting to be present at the street meeting of the Communist Party to be held the following evening to show their defiance to local police authorities and to assist the Communist Party in their revolutionary tactics (9). To urge defiance to local constituted authority is certainly advocating a crime. The phrase "revolutionary tactics" must be construed in the light of statements from Communist literature as illegal methods. That some of the official literature of the Communist Party advocated present and immediate mass action can be readily seen from a perusal of the excerpts from the mimeographed circular of December 26, 1933, issued by the agitation and propaganda Department of District 12 of the Communist Party of the United States, which includes Oregon (13), and from a perusal of the excerpts from "Why Communism" (14).

We respectfully submit that the opinion of the Oregon Supreme Court was proper, and should be affirmed by this court.

STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT ON APPEAL

The appeal does not involve a substantial Federal question.

No substantial Federal question is raised if the Supreme Court has previously passed upon the contention; for the Supreme Court of the United States has decided that no substantial Federal question forming a basis for review by the Supreme Court of the United States of a State Court, is presented by claiming that a constitutional right has been invaded where the question has been settled by previous decisions of the Supreme Court of the United States.

Utley v. St. Petersburg, 292 U.S. 106, 109, 112: 78 L. Ed. 1155, 1158, 1159.
Levering & G. Co. v. Morris, 289 U.S. 103, 108; 77 L. Ed. 1062, 1066.
Minneapolis & St. Paul, Etc. Co., v. C. L. Merrick Co., 254 U.S. 376; 65 L. Ed. 312.

In *Gitlow v. New York*, *supra*, fully discussed on pages 18, 19 and 20 of this brief, and in *Whitney v. California*, *supra*, fully discussed on pages 4, 5, 20, 21, 22 and 23 of this brief, the questions and principle involved in those cases were the same questions and principles involved in the instant case; and therefore the questions have been previously decided by the Supreme Court of the United States with the result that a substantial Federal question is not involved in the instant case.

The appellant relies on *Stromberg v. California*, *supra*, and *Fiske v. Kansas*, 274 U.S. 380, to sustain

jurisdiction. That the ruling in the Stromberg case is not applicable to the case at hand can be readily seen from the analysis of the same made on pages 15, 16 and 17 of this brief.

In *Fiske v. Kansas*, *supra*, this court reversed a judgment of conviction, previously sustained by the Supreme Court of Kansas, of a member of the Industrial Workers of the World because the proof failed to show that his organization contemplated the use of violence in its program looking to a change in industry. The facts in that case are to be differentiated from those in the Gitlow case, in the Whitney case, or in the case at hand, in that the language used in the Fiske case is essentially different from the language used in the other cases mentioned or in the case at bar. In the Fiske case there was no evidence showing an advocation of the overthrow of the existing industrial or political conditions by force, violence or unlawful means, while in the Gitlow case, in the Whitney case, and in the present case the record was replete with evidence showing an advocation of the overthrow of the existing industrial or political conditions by force, violence or unlawful means.

We respectfully submit that the record does not present a substantially Federal question.

Respectfully submitted,

JAMES R. BAIN,
District Attorney,
Multnomah County, Oregon,

MAURICE E. TARSHIS,
Deputy District Attorney,
Counsel for Appellee.

WILLIS S. MOORE,
Salem, Oregon,
Of Counsel for Appellee.